

## FLORIDA DEEPWATER HORIZON LEGAL ADVISORY GROUP

July 19, 2010

The Honorable Charlie Crist  
Governor  
State of Florida  
The Capitol  
Tallahassee, Florida 32399

The Honorable Bill McCollum  
Attorney General  
State of Florida  
The Capitol – Suite PL-01  
Tallahassee, Florida 32399-1050

RE: Deepwater Horizon Oil Spill  
Recommendations of the Legal Advisory Group

VIA: Hand Delivery

Dear Governor Crist and Attorney General McCollum:

On May 10, 2010, you appointed the Legal Advisory Group to assess the impact the Deepwater Horizon oil spill could have on Florida, with a focus on protecting the rights of Florida consumers and businesses and undertaking any actions, formal or informal, to preserve and protect the State and its citizens. Pursuant to our charge, we are writing to express our grave and growing concerns regarding the ever-changing proposals for the Feinberg claims process that is about to be implemented and to suggest steps that you, as Governor, should immediately initiate to prevent the implementation of a claims process that fails to protect and properly compensate the State of Florida and its citizens who have been, or may be, injured by the tragic events in the Gulf of Mexico.

**BP must be prohibited from seeking or obtaining releases in connection with any interim payments of compensatory damages.**

The Deepwater Horizon oil spill is a disaster of historic proportions, the consequences of which may not be fully known – or realized – for years or even decades. Accordingly, a system for BP, as the responsible party, to pay claims to individuals, businesses and State and local governments damaged by the spill must be fashioned that recognizes this disaster as an *on-going process – not a one-time event*.

For many individuals and businesses that make their livelihoods from the Gulf, the loss of income will be long-term. The duration of their losses cannot be predicted, because the scope of the harm to the Gulf eco-systems cannot be determined at this time. Fisheries may take months, years or even decades to recover from the consequences of the oil spill and the subsequent use of chemical dispersants. Indeed, the damage to the Gulf, and all those who depend upon it, will continue for years, if not decades, after the oil and gas stops flowing from the damaged well head. With each new storm and change in current, the damage from the oil and gas will be inflicted anew and could spread to new areas of the Gulf, if not beyond. Therefore, a claims process that has "total peace" for BP or a final determination of damages at this time as its goal, is inherently flawed, unfair, and prejudicial.

As existing law under the Oil Pollution Act of 1990, 33 U.S.C.A. § 2701 et seq. (OPA 90) recognizes, the receipt of interim or emergency claims payments from BP, whether directly from BP or from the Fund created through negotiations by BP and the White House, should *never* be conditioned upon a waiver of the right to pursue future claims.

While the current BP Claims Process has been fraught with delays and has failed to adequately compensate the many victims of the Deepwater Horizon oil spill, we are concerned that the process that is about to replace it has the potential to harm the citizens of the Gulf Region as profoundly and deeply as the spill itself. Despite the fact that the oil spill is still an on-going, developing and evolving disaster, the claims administrator appointed by BP and the White House without input from the Gulf States, Mr. Feinberg, has made clear his intention to make settlement payments from the Fund final and binding – providing BP with a "total peace" (Mr. Feinberg's words). This significantly and improperly changes the rights and remedies available under existing law and constitutes a significant change in the purpose of the GCCF, as originally represented by the White House.

Although initially, Mr. Feinberg stated that, consistent with OPA 90, no waiver of the right to sue would be required in order for claimants to receive "emergency payments," he is now taking the position that "the fund he'll be administering won't be dispensing any relief for losses already incurred unless the victim also consents to accept an estimate of his future damages, too, **and then releases BP from future claims**. 'My goal is to settle then and there,' Feinberg says. 'Why bother coming back? Let's resolve it right now.'" (emphasis supplied)

[http://money.cnn.com/2010/07/12/news/companies/feinberg\\_BP\\_claims.fortune/](http://money.cnn.com/2010/07/12/news/companies/feinberg_BP_claims.fortune/)

The proposed Feinberg claims process appears to require individuals and businesses to waive their right to future damages in exchange for payments now and artificially imposes a very limited time period for filing claims – despite the fact that some damages may not even be incurred for years due to the nature of the spill. This contradicts the statutory intent of OPA 90 which expressly provides that "a claimant may present a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled and that payment of such a claim shall not

preclude recovery for damages not reflected in the paid or settled partial claim.” 33 U.S.C.A. § 2714(b)(2). More importantly, it ignores the reality that the damages from this spill are not capable of calculation now – as they are still occurring.

We are most concerned with public statements regarding proposed cut off dates for the filing of claims, while millions of gallons of oil and other hazardous chemicals float in the Gulf waiting for a place to land. In a recent interview with the Financial Times, Mr. Feinberg was quoted as expressing an intent to use the Fund to *limit and reduce* BP's continuing obligation to compensate victims of the oil spill. He said that he “will set a cut-off date for filing emergency claims, likely to be one or two months after the spill ends, that will give way to a formal settlement process. Claimants are not being required to sign any waivers during the emergency claims process, but will have to agree not to sue BP in the future when they apply for a final settlement. ‘At some point I will offer the claimant a lump sum for all future loss and giving a release that they will no longer sue BP in connection with the spill. If they don't like it, they can reject the lump sum,’ he said. Analysts have raised questions about what would happen if say, in 20 years' time, serious health effects from the spill were discovered.” Mr. Feinberg said in response to that query that “claimants either accept the lump sum or choose to go to court. ‘If you think there are going to be birth defects or cancer in the future, then don't take the cheque, don't sign the waiver,’ he said.”

<http://www.ft.com/cms/s/0/4c33b44c-80b9-11df-be5a-00144feabdc0.html>

**The exclusion of Gulf States and their local governments from negotiations framing the claims process is a serious error that, unchanged, will lead to unfortunate consequences.**

In response to the inadequacies of BP's claims process and concerns about BP's commitment to meet its financial obligations under existing law, on June 16, the White House announced that it had negotiated an agreement with BP to establish a \$20 billion Fund, administered by an “independent” administrator, to “pay claims to people who lost income in the Gulf Coast oil spill.” The Fund emerged as a solution, negotiated by the White House and BP, after the President's trip to the Gulf Region to tour the oiled beaches. During that trip, the President heard complaints from Gulf citizens who were not receiving full, fair and timely payment of their claims from BP. He also heard concerns from State and local officials worried about the long-term ability of BP to make the payments required to clean-up the oil and restore the Gulf. BP agreed not to pay the previously announced \$10.5 billion dividend as part of this negotiated settlement creating the Fund.

Despite the fact that this Fund purports to substantially impact the rights and fiscal health of five States, their citizens, businesses and local governments, these negotiations occurred without consultation with or participation from any State or local officials and failed to include any Congressional representatives from any of the impacted Gulf States. Details regarding the Agreement creating the Fund are few and have emerged only through press releases and limited statements.

**In the absence of active participation in the process, what this State is learning about the negotiations leading to a claims process is very troubling.**

If there is a formal written document memorializing the intent of the White House and BP concerning the use of the Fund and the protocols governing payments from the Fund, it has not been released to the public or State officials. To date, the only written summary of the Agreement for creation of the Fund is an entry in the White House Blog and a related press release and statement by the President.

<http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow>

<http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>

Fundamentally, it is unclear whether the parties intended the Independent Claims Facility to provide an alternative claims process, administered by an "independent" administrator rather than BP's contractor ESIS, to facilitate BP's fulfillment of its OPA 90 obligation to pay claims to individuals and governments harmed by the spill, or whether the parties intended the Independent Claims Facility to be an alternative to BP's statutorily mandated obligations – *eliminating their statutory obligations* to pay under federal and State law and *replacing it* with the Independent Claims Facility and Fund (referred to as the "Gulf Coast Claims Fund" of "GCCF" in the attached draft #9 of the Protocol).

The June 16, 2010 White House press release titled "Fact Sheet: Claims and Escrow" states, in relevant part, as follows:

#### INDEPENDENT CLAIMS FACILITY□

A new, independent claims process will be created with the mandate to be fairer, faster, and more transparent in paying damage claims by individuals and businesses.

- To assure independence, Kenneth Feinberg, who previously administered the September 11th Victim Compensation Fund, will serve as the independent claims administrator.
- The facility will develop standards for recoverable claims that will be Published [it is critical that this State is involved in determining the elements of recoverable damages under Florida law].
- A panel of three judges will be available to hear appeals of the administrator's decisions. [if this is non-binding claims mediation, why is an appellate remedy provided?]
- The facility is designed for claims of individuals and businesses who have been harmed by the oil spill; local, state, tribal, and federal government claims will continue to be handled directly by BP.
- The facility will decide all claims as expeditiously as possible, and in any event within the existing statutory timeframe.

- Dissatisfied claimants maintain all current rights under law, including the right to go to court or to the Oil Spill Liability Trust Fund.
- Decisions under current law by the independent claims facility shall be binding on BP.
- All claims adjudicated under this facility have access to the escrow account for payment.

#### ESCROW ACCOUNT

BP has agreed to contribute \$20 billion over a four-year period at a rate of \$5 billion per year, including \$5 billion within 2010. BP will provide assurance for these commitments by setting aside \$20 billion in U.S. assets.

- BP has reaffirmed its commitment to pay all removal costs and damages that it owes as a responsible party. It will not assert any liability cap under OPA to avoid liability.
- The creation of the escrow account will provide assurance to the public that funds will be available to compensate the injured.
- This account is neither a floor nor a ceiling on liability.
- The escrow account is to be used to pay claims adjudicated by the independent claims facility, as well as judgments and settlements, natural resource damage costs, and state and local response costs.

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#### ENVIRONMENTAL AND HEALTH MONITORING

BP has previously committed \$500 million for the ten-year Gulf of Mexico Research Initiative to improve understanding of the impacts of and ways to mitigate oil and gas pollution.

As a part of this initiative, BP will work with governors, and state and local environmental and health authorities to design the long-term monitoring program to assure the environmental and public health of the Gulf Region.

The GCCF was initially understood to replace the much-maligned BP claims process, administered by ESIS, to pay damages to fishermen, small businesses and others who have suffered financial losses from the Deepwater Horizon oil spill. It was *not* initially understood that this Fund was being established to circumvent the claims process required by OPA 90; rather, the GCCF was thought to be a mechanism for ensuring the intent of OPA 90 was achieved. However, it has become clear in the weeks following announcement of the creation of this Fund that BP and its Administrator, Kenneth

Feinberg, perceive the "Independent Claims Facility" and accompanying Fund as *an alternative to OPA 90*. We do not believe the rights existing under OPA can be set aside in this fashion.

Even the limited guidelines announced in the June 16 White House press release, seem to have been abandoned in recent weeks as the GCCF claims process has been discussed by BP and the GCCF Administrator. If news reports are accurate, Mr. Feinberg has provided mutually exclusive positions, some of which conflict with the original framework above, in different press accounts and Congressional testimony regarding the developing protocol for this new claims process. As the weeks have passed, the representations about the purpose, scope and nature of this Fund have changed and have become increasingly alarming.

Attorney General Bill McCollum sent a letter to Mr. Feinberg on July 2, which challenged Mr. Feinberg's notions regarding the interpretation of Florida law and its applicability to the GCCF. We share all of the concerns and legal conclusions contained in General McCollum's letter. The need for immediate financial relief to the victims of this negligence is critical. Providing unfettered control over who will be immediately compensated, and the nature of the damages that are compensable, should not be left to a single, *unelected* Administrator, selected without participation by the States and their local governments. It is imperative that the claims process reflect the rights provided to victims, under existing law and that the standards governing payments from the GCCF, be developed with the input of State and local governmental officials who have been elected to represent the citizens who are suffering the consequences of this oil spill.

Further, no State and local government claims, damages and fines should be paid from the Fund – BP should and must remain obligated to *directly pay all such costs*, pursuant to OPA 90 and other applicable State and federal laws. In addition, a separate, fully secured fund should be established to compensate State and local governments for all of the costs incurred to protect local waters, including planning, the acquisition of materials and the employment of labor, areas for staging, providing the means for the safe installation, removal and replacement of barriers and the myriad of damages including the destruction of environmentally sensitive areas and lost tax revenues.

OPA 90 was enacted by Congress to provide a mechanism for obtaining compensation from a responsible party for damages caused by an oil spill. BP has acknowledged that it is the responsible party under OPA 90 for the Deepwater Horizon oil spill. As a consequence of BP's poor implementation of the claims process required by OPA 90 and threats to dissipate its assets through dividend payments and spin-offs of other assets, a Fund was created through negotiations between BP and the White House. This Fund and the Independent Claims Facility should *facilitate* BP's fulfillment of its obligations under OPA 90 – not circumvent, reduce or eliminate those obligations.

**The Gulf States must be involved in the development of the claims process from here until it is concluded.**

Last week, Mr. Feinberg provided the Gulf States Attorneys General with the ninth (9<sup>th</sup>) draft of a proposed protocol for operation of the GCCF. It is unclear who drafted this protocol with Mr. Feinberg (DOJ staff, private counsel under contract with Mr. Feinberg and compensated by BP, or BP counsel in cooperation with Mr. Feinberg's staff); however, it is clear that for the first nine drafts of this protocol no State or local officials or their staff participated in the drafting of this document.

The standards proposed in the proposed Ninth Protocol so alarmed the Attorneys General of Alabama and Mississippi, that a meeting was demanded with United States Attorney General Eric Holder in Mobile, Alabama on Wednesday, July 14<sup>th</sup>. The meeting with Attorney General Holder was attended by Alabama Attorney General Troy King, Mississippi Attorney General Jim Hood, Texas Attorney General Greg Abbott, and Louisiana Attorney General Buddy Caldwell. A senior aide was sent from the Florida Attorney General's Office to the meeting.

General King has also sent a letter to President Obama detailing the significant and fundamental problems with the Ninth Protocol. He stated that: "The document appears collusive at best and contrary to the public interest at worst," General King said he was shocked that states hadn't been asked for input before Feinberg and BP reached the ninth draft of the plan. He called it "an illegal attempt" to limit BP's liability under federal law. He also said that it aimed to keep people who have suffered damage out of state courts by making them sign a release waiving lawsuits or additional claims against BP. General King wrote that: "The federal government, especially the executive branch, has no business usurping state court jurisdiction and meddling in the state law liability arising from the oil spill,"

[http://blog.al.com/live/2010/07/troy\\_king\\_blasts\\_oil\\_spill\\_com.html](http://blog.al.com/live/2010/07/troy_king_blasts_oil_spill_com.html)

Amendments to the Agreement creating the Independent Claims Facility and Fund must and should occur, through further negotiations with BP and the White House, with the additional participation of elected and legal representatives of those impacted by the GCCF. If the rights and remedies contained in federal law are going to be altered or eliminated by the Fund, the legal representatives of the impacted States should be permitted to participate in the negotiations creating an alternative claims process that ensures that the alternative process provides no less rights and greater, fairer remedies than existing law – not more rights for BP and fewer, more limited remedies for the people victimized by BP's oil spill.

The fundamental question of how the GCCF relates to BP's OPA 90 obligations is still unanswered by the Ninth Draft Protocol. As currently contemplated in the Ninth Draft Protocol, BP's obligation to pay claims under OPA 90 is going to end when the Feinberg Fund becomes operational and the ability to file claims is terminated after three (3) years from the date the GCCF becomes operational. We doubt the legal authority for

elimination of this legal obligation through closed-door negotiations. Further, *contrary to the initial White House Fact sheet*, Mr. Feinberg and BP are now stating, in private conversations as well as recent press accounts, that, in the near future, *States and local governments will need to apply to Mr. Feinberg – not BP* – for payment of their claims as well. This will place government entities in direct competition with their citizens for the finite resources (\$5 billion a year for four years) placed in this escrow Fund. While this Fund may or may not be adequate to compensate private individuals and businesses for their losses – it is entirely inadequate to pay for the costs of restoring the Gulf and cleaning up the damage from this spill to the natural resources of the Gulf Region.

If this Independent Claims Facility and Fund are not a negotiated means of fulfilling BP's obligations under OPA 90, then how will claimants, including the States and local governments, be able to compel BP to pay the inevitable additional resources that will be required to pay for the damages caused by this spill? Although the Ninth Protocol does not make clear how States and local governments would file claims through the GCCF, he and BP have repeatedly represented that governmental claims will be handled ultimately by Mr. Feinberg and the GCCF – however, will Mr. Feinberg limit the State and local government claims to only three years when the damage and clean-up costs from this spill will surely continue for years if not decades? If this process is not significantly altered to recognize the sovereign rights of the States to protect State waters and State citizens, it will drive many into court as the alternative process proposed is simply not acceptable.

Mr. Feinberg's statements have become increasingly of concern as he suggests that he operates outside the bounds of any existing law. On the one hand, his representations about his own efforts to craft a protocol outlining who can be paid, for what damages, and with what proof, appear to place the GCCF as both outside any existing law or becoming a law unto itself – with Mr. Feinberg deciding what legal standards will apply. On the other hand, he appears to suggest he is above the law when he recently stated that "[e]ven people who run all-cash businesses should submit claims... 'If you're a fisherman, and you don't have a tax return, show me your profit-and-loss statement,' Feinberg said. 'The IRS isn't getting this stuff.'"

<http://www.tampabay.com/news/business/banking/feinberg-crist-assure-economic-victims-of-oil-spill-that-claims-will-be/1108527>

This latter statement is in direct contravention to guidelines, recently issued by the Internal Revenue Service stating that all lost wages paid through the claims process are taxable as income. To suggest to the contrary is improper and misleading.

In summation, the GCCF and Fund should be a means of fairly fulfilling BP's obligations under OPA 90 and other controlling State and federal laws. The GCCF and Fund should not operate outside existing laws, but rather, the standards under which both should operate must be drafted in harmony with existing law and be enforceable through existing legal means. Mr. Feinberg should not have the ability to dictate the standards under which the GCCF and Fund operate. He should only administer the Fund and GCCF. The




standards governing the Facility and Fund should be drafted by elected representatives of the people impacted by the spill, including federal, State and local officials and their legal representatives. The GCCF and Fund should be limited to compensating private individuals and businesses for their losses. State and Federal governments should retain their statutory rights and remedies under OPA 90 to file claims directly with BP.

Interim relief and emergency payments should not be conditioned upon waivers of long-term legal rights. Receipt of interim and emergency payments should not obligate any individual or business to take a final payment from the GCCF and, thus, waive their rights to sue BP for damages. Payments received should be offset against any future damages – but vulnerable people should not be coerced into waiving their legal rights to recover for damages not yet even calculable in exchange for immediate relief they currently are legally entitled to receive.


No cut off should be imposed on asserting claims, including personal injury claims, other than those deadlines imposed by existing law. For instance, OPA 90 expressly preserves the rights of minors to sue – the ninth Protocol makes no such allowance.

To accomplish these goals, we strongly recommend that you work in cooperation with the other Gulf State Governors, Attorneys General and impacted local government officials to immediately request that the White House resume negotiations with BP regarding the nature, scope and standards for implementation of the Independent Claims Facility and Fund and that elected officials from the impacted States be included in those negotiations.


Sincerely,



Robert A. Butterworth



Jim Smith



Eugene E. Stearns



Daniel J. Gerber

CC: The Honorable Alex Sink, Florida Chief Financial Officer  
The Honorable Charlie Bronson, Florida Commissioner of Agriculture  
The Honorable Bill Nelson, United States Senate  
The Honorable George LeMieux, United States Senate  
The Honorable Larry Cretul, Florida Speaker of the House  
The Honorable Jeff Atwater, Florida Senate President

The Honorable Mike Fasano, Florida Senate President Pro Tempore  
The Honorable Alex Diaz de la Portilla, Florida Senate Republican Leader  
The Honorable Durell Peaden, Jr., Florida Senate District 2  
The Honorable Charles S. Dean, Sr., Florida Senate District 3  
The Honorable Don Gaetz, Florida Senate District 4  
The Honorable Alfred "Al" Lawson, Jr. Florida Senate District 6  
The Honorable Ron Reagan, Florida Speaker Pro Tempore  
The Honorable Adam Hasner, Florida House Republican Leader  
The Honorable Franklin Sands, Florida House Democratic Leader  
The Honorable Greg Evers, Florida House District 1  
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The Honorable Troy King, AL Attorney General  
The Honorable James D. "Buddy" Caldwell, LA Attorney General